A

L RAJANDERAN R LETCHUMANAN

v.

TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ZULKEFLI MAKINUDIN FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NO: 05-39-2010(B)]

C

14 JUNE 2010

ADMINISTRATIVE LAW: *Judicial review - Detention order - Detention order under Dangerous Drugs (Special Preventive Measures) Act 1985 - Legality or propriety of arrest or detention at investigation stage -*

D

Whether a valid ground for judicial review

PREVENTIVE DETENTION: *Detention order - Legality - Affidavits - Failure to file affidavits of arresting/detaining officers rebutting detainee's allegation that his arrest and detention at investigation stage was unlawful - Whether could vitiate detention order - Whether not a relevant*

E

consideration for issuance of detention order - Whether Deputy Minister's detention order lawful - Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(2)(a), (b) & (c), 6(1)

The appellant had been detained pursuant to a detention order made

F

by the Deputy Minister under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). Having been unsuccessful in his application to the High Court for a writ of *habeas corpus*, the appellant had now appealed to the Federal Court. At the hearing, the appellant argued, in essence, that the detention

G

order was fatally flawed and illegal, as the respondents had not filed any affidavit to rebut his allegation that the designated police officers had not complied with the requirements of s. 3(2)(a) and (b) of the Act when effecting his arrest and detention prior to the issuance of the detention order. The respondents admitted to the

H

non-filing of the affidavits, but maintained, upon the authority *inter alia* of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors,* that such failure did not vitiate the detention order thus made. It was not in dispute that in *Mohd Faizal*, the Federal Court had decided that: (i) a writ of *habeas corpus* must be directed against

I

the current detention order even when the earlier arrest had been irregular; (ii) any irregularity for non-compliance with the procedures

under s. 3(2) (a), (b) and (c) of the Act was not a relevant matter for consideration once it had been superseded by a Deputy Minister's detention order under s. 6(1) of the Act; (iii) the precondition to the exercise of the Deputy Minister's power to order a detention was merely to consider the reports of investigation made by the police and the inquiry officer; and (iv) there was no necessity to explain the sequence of events that had transpired prior to the making of the order. This being the obtaining circumstances, before the learned justices of the apex court, issues arose as to: (i) whether the present Federal Court ought to or might in any way depart from *Mohd Faizal*; and (ii) whether the respondents' failure to file explanatory affidavits in relation to the prior arrest of the appellant was a fatal flaw that vitiated the detention order made by the Deputy Minister herein.

Held (dismissing the appeal):
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) This court is not departing from its decision in *Mohd Faizal*. (para 4)

(2) A writ of *habeas corpus* must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. The court is also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the Minister's discretion under the various executive legislations unless *mala fide* on his part is shown. Any question on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration nor is it a precondition to the order of detention of the Minister. (para 9)

(3) Only when statute requires an act to be a condition precedent to the making of a detention order can a valid complaint be made against that detention. Under the Act, as spelt out by s. 6(1) thereof, there are two conditions precedent for the Minister to consider before making a detention order, *viz*. the complete report of investigation and the report of the inquiry officer. (para 10)

(4) The scheme under the Act (similarly under the Emergency (Public Order and Prevention of Crime) Ordinance 1969) is that, before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner of conducting the investigations and arrest at this stage is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review. (para 11)

(5) *Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor* which held that a detention order made against a suspect who had been illegally detained by the police at the investigation stage is subject to judicial review is no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order. (para 11)

(6) The exclusion to produce the affidavits of the arresting officers who exercised their powers of detention under s. 3(2)(a) and (b) is not a defect that may vitiate the detention order. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah ditahan di bawah satu perintah tahanan yang dibuat oleh Timbalan Menteri di bawah s. 6(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta'). Setelah gagal dalam permohonannya untuk mendapatkan writ *habeas corpus* di Mahkamah Tinggi, perayu kini merayu ke Mahkamah Persekutuan. Di pendengaran, perayu berhujah, secara pentingnya, bahawa perintah tahanan adalah cacat secara yang memudaratkan, oleh kerana responden-responden gagal memfailkan sebarang afidavit bagi menyangkal dakwaannya bahawa pegawai-pegawai polis yang berkenaan telah tidak mematuhi peruntukan s. 3(2)(a) dan (b) Akta bilamana melaksanakan penangkapan dan penahanannya sebelum perintah tahanan dikeluarkan. Responden-responden tidak menafikan tentang kegagalan memfail afidavit, tetapi berhujah, bahawa kegagalan sedemikian, mengambilkira antara lain autoriti *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri & Ors*, tidak menjejaskan perintah tahanan yang dibuat. Tidak dinafikan bahawa di dalam kes *Mohd Faizal*, Mahkamah Persekutuan telah memutuskan bahawa: (i) suatu writ *habeas corpus* hendaklah diarahkan kepada perintah tahanan semasa walaupun terdapat

ketidakteraturan pada penangkapan; (ii) sebarang ketidakteraturan kerana tidak mematuhi prosedur-prosedur di bawah s. 3(2)(a), (b) atau (c) Akta bukanlah satu perkara relevan untuk dipertimbangkan sebaik ianya diatasi oleh perintah tahanan Timbalan Menteri yang dibuat di bawah s. 6(1) Akta; (iii) pra-syarat kepada pelaksanaan kuasa Timbalan Menteri untuk mengeluarkan perintah tahanan hanyalah untuk menimbang laporan penyiasatan yang dibuat oleh polis dan pegawai penyiasat; dan (iv) tiada keperluan untuk menjelaskan rentetan peristiwa yang berlaku sebelum dari pengeluaran perintah. Dalam keadaan yang wujud sedemikian, maka, di hadapan yang hakim-hakim mahkamah tertinggi, berbangkit persoalan-persoalan berikut, iaitu: (i) sama ada Mahkamah Persekutuan di sini sepatutnya atau harus mengambil jalan yang lain dari *Mohd Faizal*; dan (ii) sama ada kegagalan responden-responden untuk memfail afidavit penjelasan berkaitan dengan penangkapan perayu merupakan satu kecacatan fatal yang menjejaskan perintah tahanan yang dibuat oleh Timbalan Menteri di sini.

Diputuskan (menolak rayuan)
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah ini tidak akan menyimpang dari keputusannya di dalam *Mohd Faizal.*

(2) Suatu writ *habeas corpus* hendaklah diarahkan kepada perintah tahanan semasa walaupun penangkapan detainee yang sebelumnya adalah tidak teratur. Mahkamah juga tidak mengambilkira tentang kekaburan, kecukupan atau kerelevanan alasan-alasan tahanan kerana itu berada dalam lingkungan pelaksanaan subjektif kuasa budibicara Menteri di bawah beberapa perundangan eksekutif kecuali *mala fide* dibuktikan terhadapnya. Sebarang persoalan mengenai kesahan atau keteraturan penangkapan atau penahanan detainee di peringkat penyiasatan bukan suatu pertimbangan yang relevan dan bukan juga suatu prasyarat kepada perintah tahanan oleh Menteri.

(3) Hanya bilamana statut mengkehendaki suatu perbuatan menjadi prasyarat kepada pengeluaran sesuatu perintah tahanan barulah suatu bantahan yang sah boleh dibuat terhadap penahanan. Di bawah Akta, sepertimana yang dibentangkan oleh s. 6(1)nya, terdapat dua syarat untuk dipertimbang oleh Menteri sebelum membuat perintah tahanan, iaitu laporan penyiasatan yang lengkap dan laporan oleh pengawai penyiasat.

(4) Skim di bawah Akta (seperti juga dibawah Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969) adalah bahawa, sebelum sesuatu perintah tahanan diarahkan, pihak polis perlu mengadakan penyiasatan yang termasuk kuasa untuk menahan mana-mana orang yang disyakki. Kaedah melaksanakan penyiasatan dan penangkapan di peringkat ini bukan merupakan satu syarat terdahulu dan bukan juga suatu perkara yang mempunyai hubungan secara terus dengan perintah tahanan dan kerana itu bukan merupakan alasan untuk semakan kehakiman.

(5) *Koh Yoke Koon v. Minister of Home Affairs, Malaysia & Anor* yang memutuskan bahawa suatu perintah tahanan yang dibuat terhadap orang yang disyakki yang ditahan oleh polis dengan secara tak sah di peringkat penyiasatan adalah tertakluk kepada semakan kehakiman sudah tidak lagi menjadi undang-undang yang boleh dipakai, oleh kerana ia bukan suatu ketakpatuhan prosedur terhadap syarat duluan bagi membatalkan perintah tahanan.

(6) Kegagalan mengemukakan afidavit pegawai-pegawai polis yang menangkap yang menggunakan kuasa tangkapan mereka di bawah s. 3(2)(a) dan (b) bukanlah kecacatan yang memudaratkan perintah tahanan.

Case(s) referred to:

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***

Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor [1987] 1 LNS 67 HC ***(refd)***

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lim Wen Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors [2009] 1 CLJ 686 FC ***(refd)***

Minister of Home Affairs, Malaysia & Anor v. Karpal Singh [1988] 3 MLJ 29 ***(refd)***

Mohammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri & Ors [2006] 4 CLJ 687 FC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors v. Arasa Kumaran [2006] 4 CLJ 847 FC ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(2)(a), (b), (c), 5, 6(1)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3)(a), (b), 4(1), 9

For the appellant - N Sivananthan (Tina Ong with him); M/s Sivananthan & Co
For the respondent - Amir Nasruddin SFC

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Abdull Hamid Embong FCJ:

[1] The appellant was detained under a detention order dated 9 April 2009 pursuant to s. 6(1) Dangerous Drugs Act (Special Preventive Measures) 1985 (the Act) for drugs trafficking activities. He applied to the High Court for a writ of *habeas corpus* for his release. The High Court had on 19 February 2010 rejected his application. He now appeals to the Federal Court.

[2] The sole ground of appeal is the complaint of non compliance with s. 3(2)(a) and (b) of the Act. It was submitted that since there are no affidavits filed by the respondent to rebut the challenge by the appellant of that non compliance to show that the arrest and detention in custody by the police was properly discharged by the designated officers under those subsections, the subsequent detention order made by the Deputy Minister is therefore illegal.

[3] The learned senior federal counsel while admitting that there are no affidavits in reply submitted that this does not affect the legality of the detention order made by the Deputy Minister, relying on the authorities which we will now discuss.

[4] The legal issue for our determination in this appeal is neither new nor novel. It has been considered in the decisions of this court in the cases of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 4 CLJ 613 and *Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors v. Arasa Kumaran* [2006] 4 CLJ 847. Learned counsel for the appellant conceded that if

A *Mohd Faizal* is good law then this appeal is groundless. He however submitted that a different interpretation should be given to the non compliance that arose in this appeal. We say that we are not departing from that decision.

B **[5]** In the former case the question that arose was whether the defects in the arrest of the detainee vitiated the subsequent detention order made by the Deputy Minister. What the Federal Court held in that case may be so summarized. Firstly, an application for a writ of *habeas corpus* must be directed against the C current detention order even when the earlier arrest had been irregular. Secondly, any irregularity for non compliance with the procedures under s. 3(2)(a), (b) and (c) is not a relevant matter for consideration when it has been superseded by the Deputy Minister's detention order made under s. 6(1) of the Act. Thirdly, the pre-D condition to the exercise of the Deputy Minister's power to order a detention is merely to consider the reports of investigation made by the police and the inquiry officer. And lastly, there is no necessity to explain the sequence of events that transpired prior to the making of the detention order, and it follows that there is no E necessity to file explanatory affidavits in relation to the prior arrest of the detainee.

[6] *Arasa Kumaran* concerns an executive detention order made by the Minister under the Emergency (Public Order and Prevention F of Crime) Ordinance 1969 (the POPOC). In that case the complaint made by the respondent was on the non-compliance by the police with the requirements of s. 3(3)(a) and (b) of the POPOC ie, the irregularities in the prior arrest made by the police preceding the detention order. The Federal Court held that the *ratio* G *decidendi* of Mohd Faizal stating that any illegality in the prior arrest and detention cannot be the subject matter of inquiry and thus not relevant in any judicial review, is similarly applicable to a detention order under the POPOC. In *Arasa Kumaran* it was similarly held that there is no necessity for affidavits to be filed in relation to the prior arrest and detention.

H

[7] *Mohammad Jailani Kassim v. Timbalan Menteri Keselamatan Dalam Negeri & Ors* [2006] 4 CLJ 687 involved a challenge on the omission of the inquiry officer to adduce any evidence by way of affidavit to show that an inquiry was conducted by a proper and I qualified inquiry officer to prepare a report under s. 5 of the Act for the consideration of the Minister.

The Federal Court held that since the report of the inquiry officer is a statutory pre-condition under s. 5 to the exercise of the Minister's powers of detention under s. 6(1) of the Act, the failure to produce any evidence to prove that the inquiry officer had complied with that requirement under s. 5 or to support "the role that he played" under that section, is a clear breach of a statutory procedural requirement and thus subject to judicial review. Unlike the situation in *Mohd Faizal*, the report of the inquiry officer in this case was held by the Federal Court as a necessary and mandatory pre-condition to the exercise of the Minister's power under s. 6(1) of the Act since the law requires the Minister to consider that report before issuing a detention order. As such affidavits need to be filed to answer the allegation that the inquiry officer had not conducted any investigations. And since there was no explanation from the inquiry officer to show the role played by him, the regularity of the current detention by the Minister was itself subject to judicial review. The defect thus is not on the illegality of the prior detention (as in *Mohd Faizal*) but affects the current detention order of the Minister itself.

[8] The recent decision of this court in *Lim Weng Jeng v. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2009] 1 CLJ 686, a case concerning a detention order under s. 4(1) of the POPOC, also needs a mention. In that case, the complaint was against the refusal of the advisory board (due to the short notice), to issue summons to witnesses required by the appellant in the representation proceedings before it, pursuant to s. 9 of the POPOC. The Federal Court held that s. 9 is not a mandatory procedural requirement, and that the failure of the advisory board to adhere to it would not subject the detention order to a judicial review.

[9] The cases referred to above illustrate the principles upon which the courts will consider in allowing for judicial review on an executive detention order. It may be stated this way. A writ of *habeas corpus* must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. The court is also not concerned with the vagueness, sufficiency or relevancy of the grounds of detention which is the sphere of the subjective exercise of the Minister's discretion under the various executive detention legislations unless *mala fide* on his part is shown. (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home*

Affairs), *Malaysia* [1969] 1 LNS 65 see also *Minister of Home Affairs, Malaysia & Anor v. Karpal Singh* [1988] 3 MLJ 29). Any questions on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration nor is it a pre-condition to the order of detention of the Minister.

[10] Only when statute requires an act to be a condition precedent to the making of a detention order can a valid complaint be made against that detention. Under the Act there are two conditions precedent for the Minister to consider before making a detention order. These are found in s. 6(1) of the Act which states that:

> **6. Power to order detention and restriction of persons**
>
> (1) Whenever the Minister, after **considering**:
>
> (a) the **complete report of investigation** submitted under subsection (3) of section 3 and
>
> (b) the **report of the Inquiry Officer** submitted under subsection (4) of section 5,
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years. (emphasis added)

[11] The scheme under the Act (similarly under the POPOC) is that before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner on conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review. Previous cases such as *Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor* [1987] 1 LNS 67, which held that a detention order made against a suspect who had been illegally detained by the police at the investigation stage is subject to judicial review are no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order. (see also the Federal Court case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914).

[12] Learned counsel for the appellant also referred us to the case of *Ong Hong Seng v. Menteri Dalam Negeri, Malaysia & Ors* (Rayuan Jenayah 05-160-2009 J). In this case the Federal Court had allowed the issue of a writ of *habeas corpus* applied by the appellant who was detained under s. 4(1) of the POPOC. We have no benefit of a written judgment, but from perusal of the appeal records it is clear that the thrust of the complaint in this case was against the failure of the respondent to adduce evidence that the officer who prepared the report under s. 3(3)(c) of the POPOC for submission to the Minister was not one of the officers who was designated by the Inspector General of Police to do the reporting to the Minister under that subsection. As a result, no report, which is a condition precedent to a valid detention order, was before the Minister for his consideration. The effect of this non-compliance, by the same course of reasoning of the Federal Court in Mohd Faizal, is to invalidate the detention order made by the Minister. This is because the consideration of that report under s. 3(3) is part of the decision making process, ie, a procedural requirement, a breach of which will subject the order of the Minister to judicial review.

[13] It may be mentioned that the scheme under POPOC differs from that of the Act in that the former makes no mention of the need for a report from an inquiry officer for the Minister's consideration. This makes the report from the Inspector General of Police or his designated officers, the only and crucial report for the Minister's consideration before making a detention order.

[14] Coming back to the pith of the matter in this appeal, we hold that the exclusion to produce the affidavits of the arresting officers who exercised their powers of detention under s. 3(2)(a) and (b), is not a defect that may vitiate the detention order.

[15] For these reasons, this appeal is dismissed.